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No. 90-1589

In the Supreme Court of the United States

OCTOBER TERM, 1990

AKHLAQ A. CHAWLA, PETITIONER

v.

CHARLES MCCAUSLAND, DIRECTOR,
DEFENSE LOGISTICS AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in finding that petitioner did not satisfy the requirements for equitable tolling of the 30-day filing deadline described in 42 U.S.C. 2000e-16(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unreported. The opinion of the district court (Pet. App. A4-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. The petition for a writ of certiorari was filed on March 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner formerly was employed by the Defense Logistics Agency. In response to an adverse employment

action, petitioner pursued administrative remedies, claiming that the Agency had discriminated against him because he was a Pakistani and a Muslim. On January 17, 1989, he received a copy of the Agency's final decision denying these claims. Within 30 days he filed suit in the United States District Court for the District of Colorado. See Pet. App. A4-A5. Respondent moved for dismissal on the ground that venue was improper, arguing that venue was proper only in Ohio. Petitioner did not directly respond to the motion for dismissal, but instead filed a motion seeking a transfer to Missouri. The Colorado district court dismissed the action without prejudice on May 15, 1989. *Id.* at A7-A8. Petitioner did not appeal.[1]

2. Over 250 days later, on January 25, 1990, petitioner filed this action in the United States District Court for the Southern District of Ohio. The district court noted that 42 U.S.C. 2000e-16(c) sets forth a 30-day statute of limitations and that petitioner had not filed his complaint within the requisite time period. The court also noted that "the limitation period is not jurisdictional," but that petitioner "ha[d] set forth no facts which would permit equitable tolling." Pet. App. A5. On appeal, the Sixth Circuit affirmed. It noted that petitioner filed his complaint in the Southern District of Ohio more than a year after receiving the final notice and that "[w]hile the concept of equitable tolling may be applied to filing requirements in Title VII cases, [petitioner] did not demonstrate that he was entitled to such relief." *Id.* at A3.

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[1] Petitioner suggests (Pet. 8) that the Colorado district court's failure to transfer the case to Missouri offers a reason to grant the writ here. Whatever the merits of the motion to transfer, petitioner's suggestion is incorrect, because the decision of the Colorado district court is not presented by this petition seeking review of the decision of the Sixth Circuit reviewing petitioner's appeal of the decision of the Ohio district court described below.

ARGUMENT

Petitioner argues that the lower courts misapplied the doctrine of equitable tolling by declining to apply it to the facts of his case. This claim does not warrant review by this Court.

Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), provides that upon receipt of the final action of the employing agency on an administrative complaint of employment discrimination, an aggrieved federal employee may either appeal to the Equal Employment Opportunity Commission or file a civil complaint in United States District Court; if the employee chooses to file a civil complaint, he must file the complaint within 30 days of receipt of notice of the employing agency's final decision.

Although this time limit is subject to equitable tolling, such relief is to be granted only "sparingly" and not to a claim that is "at best a garden variety claim of excusable neglect." *Irwin* v. *Veterans Administration*, 111 S. Ct. 453, 457-458 (1990). In *Irwin*, the Court outlined the typical situations to which the doctrine applies: "situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 458. By contrast, the Court indicated that federal courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Ibid.*

Petitioner instituted this action more than a year after he received the final notice of the agency's decision, more than 11 months after expiration of the statutory deadline.[2]

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[2] Petitioner's complaint in this action bore the style, "Amended Complaint," and petitioner suggests (Pet. 5) that pursuant to Fed. R. Civ. P. 15 the complaint in this action relates back to the date of the filing

Accordingly, petitioner's action is untimely under the statute; he can prevail only if the lower courts erred in determining that he failed to justify equitable tolling. Comparison of petitioner's situation to the situations described by this Court in *Irwin* makes it clear that the lower courts acted correctly in denying petitioner's claim of equitable tolling. First, it is impossible to contend that petitioner "actively pursued his judicial remedies," 111 S. Ct. at 458. After the dismissal of his Colorado complaint, he took no action whatsoever for more than eight months, a considerable delay in comparison to the statutory filing deadline of 30 days. Nor is there any evidence that any misconduct by respondent "tricked [petitioner] into allowing the filing deadline to pass." *Ibid.*[3] Rather, petitioner readily falls within the group of late-filers who simply "fai[l] to exercise due diligence in preserving [their] legal rights." *Ibid.*

All of the cases cited by petitioner as compelling relief predate *Irwin*, and thus could not help petitioner even if they did suggest that relief is appropriate. In any event, all the cases petitioner cites reflect the rule set forth in *Irwin* that tolling is available to plaintiffs who actively pursue their remedies; none of them suggests an error in the decision by the courts below. In *Burnett* v. *New York Central R. R.*, 380 U.S. 424 (1965), the plaintiff filed an action in a

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of the complaint in his Colorado action. Because Fed. R. Civ. P. 15 applies to amendments of pleadings, rather than to pleadings instituting new actions in different courts, this suggestion has no merit.

[3] Petitioner suggests (Pet. 7) that respondent is at fault for sending petitioner a notice that failed to indicate the court in which venue was proper. Petitioner cites no authority for this novel idea. Moreover, petitioner hardly was prejudiced, because respondent identified the correct court in its motion to dismiss the Colorado filing, which was filed on April 27, 1989. Pet. App. A7. Even after that filing put petitioner on notice as to the proper venue for his action, it was more than eight months before petitioner brought this action in the appropriate venue.

timely manner, but in the wrong court, and then proceeded to file in the correct court before the earlier action became final. This Court held that the limitations period was tolled during the pendency of the incorrectly filed action. In *Warren* v. *Department of the Army*, 867 F.2d 1156 (8th Cir. 1989), the plaintiff filed suit in a timely manner, but failed to sue the correct defendant until after the statutory deadline had passed. Finally, in *Washington* v. *Ball*, 890 F.2d 413 (11th Cir. 1989) (per curiam), the plaintiff—before the statute of limitations had expired—sought an extension of the time within which to file his complaint, but was advised incorrectly by the court clerk that he simply should file the complaint late and then seek the extension.

None of these cases affords any aid to petitioner. Even granting him the benefit of *Burnett*, and assuming that he was entitled to tolling of the limitations period during the pendency of the Colorado action, he cannot justify the delay of more than eight times the limitations period after dismissal of that action. Because petitioner has posited no explanation for such an extraordinary delay, there is no reason to believe the courts below erred and no reason for this Court to review petitioner's claim.[4]

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[4] This Court recently remanded a case raising a claim for equitable tolling to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Irwin*, apparently because the Fifth Circuit at the time the case had been decided had believed that the time limit described in 42 U.S.C. 2000e-16(c) was not subject to equitable tolling. See Pet. at 8, *Wood* v. *United States Postal Service*, No. 90-6553 (Apr. 15, 1991). Because both of the courts below recognized that equitable tolling was available, though inappropriate here, there is no need to remand this case for further consideration in light of *Irwin*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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